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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 760

In the Matter of

The Application for Order in Pursuance of the provisions of Article 78 of the Civil Practice Act, in favor of

CARMINE PERA,

*Petitioner-Appellant,*

v.

JOHN A. LYONS, as a New York State Commissioner of Correction; the NEW YORK STATE BOARD OF PAROLE consisting of Frederick A. Moran, Chairman, Louis F. Costuma, Reginald B. Taylor, Donald H. Grant, Edward Donovan, Commissioners; THE PAROLE BOARD OF AUBURN STATE PRISON consisting of the Principal Keeper, the Deputy Superintendent of Industries, the Head Physician and the Warden of the said Institution,

*Respondents-Respondents.*

Appeal from the Supreme Court, County of Cayuga, State of New York.

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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291 Broadway,
New York, N. Y.

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## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

### Jurisdiction

The New York Court of Appeals has amended its remittitur in this case to certify that a question under the Fed-

eral Constitution was presented and necessarily passed upon by that Court. The amended remittitur is contained in Appendix A to this Brief.

## The Questions Are Substantial

Petitioner-appellant contends that 1936 and 1948 statutes have deprived him of substantial advantages under the 1932 laws in force when his crime was committed, as follows:

(a) The 1932 New York statutory compensation plan gave him a possibility of allowance of compensation for good behavior by the Governor in his discretion, and provided that *if* the Governor did allow the recommended compensation, he should be automatically released under the Governor's warrant to serve the balance of his sentence outside the penitentiary, subject to parole conditions.

(b) The 1936 and 1948 statutes transferred the power to grant or deny compensation to the Prison Boards, and provided that *if* compensation was granted (as it has been in the case at bar), petitioner-appellant should not be released unless the Board of Parole also approved of his release.

1. Respondents-appellees in their motion to affirm have first argued that "no provision for parole existed" in 1932 for a second offender such as petitioner-appellant, and that his only hope was a release "by executive clemency." In support of this argument they have cited the following statement from *People* v. *Washington*, 1934, 264 N. Y. 335, 338, dealing with indeterminate sentences for second offenders:

> "• • • there is, at this writing, no provision for parole of second offenders. (See Correction Law, § 223; Cons. Laws, ch. 43.) The minimum term of thirty years means nothing."

But what petitioner-appellant has claimed under the 1932 law is neither a provision for parole by the Board of Parole, nor executive clemency under the Governor's constitutional powers (Art. IV, § 4). He has claimed rights in 1932 under a *statutory compensation plan,* rights which would accrue to him *if* the Governor granted him the statutory compensation for good behavior. The provisions of the Correction Law (which is also Cons. Laws, c. 43) as they stood in 1932 (and in 1934 when *People* v. *Washington* was decided) make this distinction clear. Parole is dealt with in Article 8 of the Correction Law under the title "Parole". Section 223 which is cited by the Court as its authority for this statement, is in this Article 8 on "Parole", and it deals only with the prisoners to which this Article 8 on "Parole" shall apply. By its terms, as the Court says. this Article on parole applies only to first offenders with indeterminate sentences. Correction Law, Section 223, is set forth as Appendix B hereto, being 1 Laws of New York 1932, p. 1005, c. 457, § 223.

The rights which petitioner-appellant has claimed under the 1932 laws with regard to release after allowance of compensation for good behavior are found in Article 9 of the Correction Law, under the title "Commutation." It is submitted that in this statement from *People* v. *Washington,* the New York Court of Appeals meant just what it said—that second offenders were not eligible under Article 8 for "Parole"—but did not deny the provisions of Article 9 on "Commutation" to second offenders with indeterminate sentences.

Compensation allowances and release by the Governor for second offenders were all handled under this statutory compensation plan in Article 9 until 1936. Second offenders with definite sentences are still handled under it. The 1936 and 1948 laws have not ameliorated petitioner-appellant's situation. They have placed him and other second offenders with indeterminate sentences under a new and substantial disadvantage in seeking to serve the balance of their sentences outside the penitentiary after compensation for good

behavior has been allowed. These men must now get the approval of the Board of Parole, in addition to allowance of compensation, before they can be released.

2. Respondent-appellee has also argued that in 1932 New York Correction Law Section 230 prevented petitioner-appellant from having his 20 year minimum term diminished by allowance of the statutory compensation, because his maximum sentence was to life imprisonment. No New York cases have been cited to construe this section. The Appellate Division opinion in the case at bar did not cite it or rely on it in any way.

It is submitted that the sole purpose of this Section was to eliminate the insoluble problem of deducting monthly compensation allowances from a sentence of uncertain length like a sentence to life imprisonment. This same section 230 also provided that compensation should be deducted from the minimum term of an indeterminate sentence, and in the case at bar the minimum term was 20 years, from which monthly compensation may of course be easily deducted.

The administrative construction of Section 230 by the New York Prison Board and Board of Parole bears out this construction of the Section. For this provision of Section 230 is still on the statute books of New York, and if it would have barred allowance of compensation to petitioner-appellant in 1932, it ought to do so still. Yet the Prison Board has granted him compensation (Record, fol. 171) and the Board of Parole called him before it on March 3, 1950, to consider his eligibility for parole on the basis of the compensation allowed (fols. 175-182).

To the same effect is the statement in the "Motion to Affirm" of respondents-appellees, that after the passage of the 1936 and 1948 statutes petitioner-appellant's "minimum sentence could be reduced by the allowance of 'earned good time' and he could be admitted to parole." If this is so, clearly Section 230 could not have barred such an allowance in 1932 either, for nothing in the 1936 and 1948 statutes in

any way affected the applicability of Section 230. Section 230 is equally applicable to first and second offenders. Respondents-appellees construe the subsequent legislation as merely "permitting him to enjoy the same status as a person convicted for the first time of the crime of murder in the second degree, who had received a sentence of twenty years to life."

It is submitted that the application to petitioner-appellant of the 1936 and 1948 New York statutes, according to their clear meaning, as construed by the New York courts in this case, presents substantial questions of their invalidity as *ex post facto* laws.

Respectfully submitted,

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## APPENDIX A

Order of the Court of Appeals denying motion for reargument and granting motion to amend remittitur, dated March 13, 1952.

A motion for reargument of or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein, and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reargument be and the same hereby is denied. And it is further ORDERED that the said motion to amend the remittitur be and the same hereby is granted and the remittitur amended so as to provide as follows: A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz: whether the construction which the courts of this State placed upon § 2 of Chapter 70 of the Laws of 1936, amending § 212 of the Correction Law, and of § 1 of Chapter 631 of the Laws of 1948, amending §§ 235, 236 and 241 of the Correction Law, violated the provisions of § 10 of Article 1 of the Constitution of the United States prohibiting *ex post facto* laws. This Court held that those statutes did not violate the constitutional prohibition against *ex post facto* laws.

AND the Supreme Court, Cayuga County, is hereby requested to direct its Clerk to return said remittitur to this Court for Amendment accordingly.

## APPENDIX B

*Correction Law § 223 as it read in 1932 and 1934:*

1 Laws of New York 1932, p. 1005, c. 457, Article 8:

§ 223. *Application of Article.* The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison and who has never before been convicted of a crime punishable by imprisonment in a state prison. It shall not apply to any other persons. All rules of the board of parole applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight, shall continue to have the force and effect of law.